Supreme Court, U. S.
FILED
JAN 3 1980
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1049

C. CARLTON SMITH, JR., *Petitioner*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE
ARKANSAS COURT OF APPEALS

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January 3, 1980

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The petitioner C. Carlton Smith, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arkansas Court of Appeals entered in this proceeding on September 5, 1979.

OPINION BELOW

The opinion of the Arkansas Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The opinion of the Arkansas Court of Appeals was delivered on September 5, 1979. No petition for rehearing was

filed. On December 4, 1979, Mr. Justice Blackmun signed an order extending the time for filing this petition for certiorari to and including January 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The Arkansas Court of Appeals has held that, for the purposes of the Arkansas Securities Act, a security is an investment of money or money's worth in the risk capital of a venture with the expectation of benefit to the investor *where the investor has no direct control over the investment or policy decisions of the venture* (emphasis supplied). Petitioner was convicted of a violation of the Arkansas Securities Act despite the absence of any evidence on the record that the alleged "investor", Michael Wilkins, lacked direct control over the investment or policy decisions of the venture, Russellville Radio Telephone Company, Inc. The question presented is:

> Whether a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process as defined by the 14th Amendment of the Constitution of the United States.

STATUTORY PROVISION INVOLVED

Ark. Stat. Ann. Sec. 67-1235 (Repl. 1966) Arkansas Securities Act, Section 1. Unlawful Acts in Connection with Offer, Sale or Purchase of Securities

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

STATEMENT OF THE CASE

Michael Wilkins and Memphis Mobile Telephone, Inc., (MMT) are joint owners of Russellville Radio Telephone Company, Inc. (RRTCO), each holding 500 shares of stock. The State of Arkansas contends that Wilkins was induced to purchase his 500 shares through fraudulent means or otherwise in violation of the Arkansas Securities Act. Petitioner contends that, from the very beginning, Wilkins has exercised direct control over the activities and policies of RRTCO and therefore, in light of the opinion of the Arkansas Court of Appeals, Wilkins' ownership of the 500 shares did not result from a "securities transaction" which is subject to the Arkansas Securities Act.

MMT is a Tennessee corporation which was formed in 1973 for the purpose of providing radio common carrier services, i.e., mobile telephone and pocket paging services, to the public in Memphis, TN, and surrounding communities (370-371). The company determined that, in addition to Memphis, smaller communities in the

states of Tennessee, Arkansas and Mississippi offered potential for profitable radio common carrier operations. MMT decided to investigate the feasibility of establishing radio common carriers at various locations in those states (376).

Mr. Carlton Smith, a Vice President of MMT, was authorized to conduct feasibility surveys in several Arkansas communities, including Russellville (380). These surveys were intended to ascertain whether radio common carrier services were presently available in the involved communities, whether there existed a public need for new or additional services, whether adequate maintenance facilities and employees were available locally and whether an appropriate operational control point was available locally (380-383, 540).

In conducting such surveys, the presence and quality of service rendered by any existing radio common carrier in a given community is crucial. The Federal Communications Commission (F.C.C.) strictly regulates radio common carrier operations and affords existing carriers the right to

oppose new carriers on the grounds, *inter alia*, of electronic or economic mutual exclusivity. The quality of existing services also plays a crucial role in evaluating public need for additional service.

In Arkansas, MMT has frequently met with vociferous opposition from Mr. Otis Hale, the existing F.C.C. licensee in a number of Arkansas communities, including Russellville (378, 383). With the above in mind, in May of 1976 MMT sent Mr. Smith to Russellville to evaluate the feasibility of establishing a radio common carrier there and to investigate the existence and quality of Mr. Hale's service in that community (384). Mr. Smith had been advised by a Mr. Jacobi that Hale was not providing any service in Russellville and Smith wanted to verify this situation (603).

At that time, Michael Wilkins was part owner and manager of 76 Communications, Inc., a corporation which sells and services communications equipment in Russellville and Hot Springs, AR (61). Upon his arrival in Russellville on May 1, 1976, Mr. Smith observed the offices of 76 Communications and determined

from advertising signs that the company was engaged in the sale and service of communications equipment (601). He entered 76 Communications with three purposes in mind: (1) to use a telephone book to find Mr. Jacobi's phone number; (2) to determine if Hale advertised in the local phone book and whether 76 Communications had heard of Hale and his services; and (3) to determine if 76 Communications might be suitable as a maintenance facility for a radio common carrier in Russellville (61, 66-67, 99, 602, 603-605).

Smith introduced himself to Wilkins and inquired whether Wilkins knew of Hale and whether there was any radio telephone service available in Russellville (603-604). Over lunch, Smith showed Wilkins a copy of Hale's F.C.C. license application and told Wilkins he suspected that Hale had abandoned service in Russellville (70, 605). Smith asked Wilkins if he would like to accompany him to nearby White Oak Mountain to examine Hale's antenna site and to determine if the same was operational (100, 605). Wilkins said he would.

After Smith and Wilkins inspected Hale's antenna site and determined that radio common carrier services were not being provided to Russellville by Hale, Smith informed Wilkins that MMT was interested in developing a radio common carrier in Russellville (606). Smith asked Wilkins whether 76 Communications would be willing to provide maintenance and installation services if MMT did establish a radio common carrier there (606). Wilkins replied that he would be willing to do so, but also indicated that he, Wilkins, wanted to be a part of any carrier which was established in Russellville (606). Wilkins volunteered that if MMT wanted a local investor, he was interested and was willing to place $5,000 into a radio common carrier venture (68, 608, 631-632). Smith replied that he was not authorized to respond to Wilkins' request, but that he would relay Wilkins' interest to the owners of MMT, in particular Messrs. Terrence B. Miller and Odie S. Graves (606-607).

Later that same day, Mr. Smith returned to Memphis where he reported his findings to Messrs. Miller and Graves.

That evening, Articles of Incorporation were prepared for Russellville Radio Telephone Company, Inc. and a mailgram was sent to the F.C.C. informing the agency of Hale's abandonment of service to Russellville (106-108, 504, 623 and def. Exhibit 16).

Mr. Miller, in addition to being a 20% stock owner of MMT, is owner and operator of an F.C.C. regulated marine radio station in Memphis, WJG Telephone Company, valued at $750,000 (364-366, 368). Mr. Graves, in addition to being 20% stock owner of MMT, is the owner of Graves Answerphone Service, Inc., a telephone answering service which has operated in Memphis since 1951, valued at $425,000 (536, 538-539). Messrs. Graves and Miller conferred to determine whether MMT should accept Wilkins' request. In considering Wilkins' request, Miller and Graves were aware that the F.C.C. looks favorably upon local ownership of radio common carriers (383). It was, therefore, determined that Wilkins' request should be granted and that Wilkins and MMT would

be co-equal joint venturers in the Russellville project. Wilkins would contribute $5,000 plus his facilities, time, and effort in Russellville as the local manager while MMT would contribute the services of Mr. Smith, equipment, communications expertise and unlimited funds as necessary to file and prosecute an application at the F.C.C. (447-448, 449-450, 185, 543-544). As it subsequently occurred, MMT's investment turned out to be substantially greater than Wilkins since MMT provided $30,000 worth of equipment to RRTCO, transportation to and from Washington, D. C. and New York City on several occasions, the expertise necessary to prepare and file applications, complaints and other documents with the F.C.C., legal fees, and the services of Mr. Smith over an extended period of time.

RRTCO's Articles of Incorporation were filed with the Arkansas Department of State on May 5, 1976 (297, State Ex. 18). Mr. Smith subsequently showed the Articles to Wilkins who filed a copy with the County Clerk's Office in Russellville on May 6, 1976, and paid the $5.00 filing

fee (69-70, 118-119).

On May 9, 1976, Wilkins and MMT executed a Memorandum of Understanding which set forth their agreement as of that date in the following language:

> It is hereby agreed and understood by and between Memphis Mobile Telephone, Inc. and Michael E. Wilkins that the two parties shall undertake a joint venture for the purpose of development of a land mobile radio common carrier utility in and about Russellville, Pope County, Arkansas. Said venture is to be known as the Russellville Radio Telephone Company, Inc. ...
>
> * * *
>
> The initial expenditures of the firm shall be $500 for demographic engineering and frequency coordination, and $190 to the F.C.C. for a license application on F.C.C. form 401.
>
> * * *
>
> Shares of stock for Russellville Radio Telephone Company, Inc. are to be issued ASAP.
>
> /s/ Carlton Smith
> For Memphis Mobile
> Telephone, Inc.
>
> /s/ Michael Wilkins

It was Wilkins' understanding that he and MMT would be partners, that is, each would have an equal voice in control and management of RRTCO (113-114).

On the same date on which the Memorandum of Understanding was prepared, RRTCO dispatched a mailgram to the F.C.C. complaining of the abandonment of service by Hale in Russellville (110). The mailgram was prepared in Wilkins' presence, with Wilkins' approval, submitted over Wilkins' signature, and charged to Wilkins' telephone (107-108).

On or about May 17, 1976, Wilkins travelled to Memphis to meet personally with Messrs. Graves and Miller and to examine the offices of MMT and the facilities of Graves Answerphone, Inc. and WJG Telephone Company (87, 103-104, 385-386, 544). Extensive discussions were had between the parties. Wilkins reaffirmed that he wanted to be part of the "operation" in Russellville (386). Wilkins had in his possession a check drawn on the account of 76 Communications, Inc. in the amount of $345 (615). The check was intended to pay for one-half of the

F.C.C. filing fee for an RRTCO application ($190) and one-half of the demographic engineering and frequency coordination to be done by Spigolon Engineering ($500). Wilkins held the check until May 19, 1976 (615).

On the evening of May 17, 1976, Wilkins assisted in the preparation of a special temporary authority application to be filed on RRTCO's behalf with the F.C.C. (86, 391). The application alleged a need for radio common carrier services in Russellville and the abandonment of service by Hale (487, def. Exhibit 15). 76 Communications, Inc. was shown as the control point for RRTCO in Russellville.

On May 18, 1976, Messrs. Smith, Miller and Wilkins travelled to Washington, D. C., at MMT's expense to file the RRTCO special temporary authority application and for Wilkins to meet and confer with staff members of the F.C.C. (116, 616). On May 19, 1976, Messrs. Smith, Miller and Wilkins returned to Memphis. Upon their return, MMT accepted Wilkins' check for $345 as his one-half contribution to the filing fee

and engineering fee for RRTCO's permanent application (198, 615). Prior thereto, except for the mailgram fee and the $5.00 fee to file the Articles of Incorporation, MMT had borne all of RRTCO's expenses.

On June 5, 1976, RRTCO issued 1,000 shares of its common stock. Five hundred shares were issued to Wilkins and five hundred were issued to MMT (121, 452, 620, 632). No money changed hands.

On June 6, 1976, Wilkins delivered to MMT an $800 check drawn on the account of 76 Communications, Inc. for the purpose of purchasing two Aerotron mobile telephones (76-78). The two radios were to be given to a third party in exchange for two lots on Mt. Nebo on which RRTCO would locate its antenna site (619). Wilkins subsequently received the two radios and they are presently in 76 Communications' shop in Russellville (180-181).

On June 10, 1976, Wilkins again travelled to Memphis in order to join Messrs. Miller and Smith on a business trip to Washington, D. C. Prior to their departure, Wilkins tendered to MMT

a check in the amount of $3,850 (76). He also became Vice President of RRTCO on that date (389-445).

It is unclear whether the $3,850 was intended to be applied to the purchase of equipment, as Wilkins testified, or whether the money was intended as consideration for Wilkins' 500 shares of RRTCO stock (79). A handwritten note on the otherwise typed check reads, "Balance toward stock purchase for Russellville Radio Telephone" (79). Wilkins could not recall putting this memo on the check (121). In any case, all of the $3,850 was subsequently used for the promotion of RRTCO (636).

The following day, June 11, 1976, Wilkins and Smith flew to Washington, D. C., at MMT's expense in order to file a complaint with the F.C.C. In that complaint, RRTCO asked the Commission to issue a show cause order against Otis L. Hale d/b/a Mobile Communications (134). Wilkins signed the complaint as Vice President of RRTCO and executed the certificate of service showing service upon

Hale's attorney (134-135, 669-673). Thereafter, Smith and Wilkins travelled to New York City, again on RRTCO business and again at MMT's expense(453).

During this period of time, Wilkins actively participated in the management and affairs of RRTCO. As noted, he travelled to Memphis on several occasions to meet with the other owners of RRTCO and he served as Vice President of RRTCO (85, 179). Further, Wilkins used his personal residence in Russellville (an apartment) for a period of 4-5 months for company operations (145-146). Wilkins personally conducted "need" surveys in Russellville. He obtained 6 letters of support from local Doctors, including one from his father, Dr. Charles F. Wilkins, Jr., which were subsequently filed with the F.C.C. in RRTCO's application for a construction permit (524, 611). Wilkins received and stored radio telephone equipment intended for use or sale by RRTCO at his home and at the facilities of 76 Communications, Inc. (148, 161-162, 448). The equipment is still in Wilkins' possession (161).

Wilkins also took an active role in

the expansion efforts in Arkansas of companies affiliated with RRTCO (622). For example, on May 19, 1976, Wilkins acted as incorporator and an initial director of Signal Technology Corporation, an affiliated company whose purpose was to design and manufacture experimental electronic equipment (124, 127, 624, 626-627). On June 17, 1976, Wilkins served as incorporator and an initial director of Conway Radio Telephone Company, Inc. (128, 624). The stock of this company was issued by Wilkins over his signature (172). On June 17, 1976, Wilkins acted as incorporator and an initial director of Malvern Radio Telephone Company, Inc. (127, 624). On June 18, 1976, Wilkins incorporated and served as initial director for Morrilton Radio Telephone Company, Inc. (131, 624).

Wilkins also played an active role in the development of Hot Springs Telephone Company, Inc. (HSTCO). Half of the stock of HSTCO is owned by RRTCO and the other half is owned by residents of Hot Springs, AR (133). Wilkins travelled to Hot Springs on several occasions to assist in setting up the company

and to determine whether Hale's service in Hot Springs was active (592, 641). Wilkins contacted local investors in Hot Springs on behalf of HSTCO and issued the stock certificates of HSTCO over his signature (172, 587). Wilkins is authorized to sign checks on HSTCO's bank account (560, 590).

At an uncertain point in time and for uncertain motives, Wilkins reversed course and undertook to block RRTCO's corporate efforts. In September of 1976, he filed a protest with the F.C.C. disassociating himself from MMT, blocking RRTCO's license, and alleging that he had been defrauded (182-184, 533). Civil lawsuits were filed by Wilkins and, in connection therewith, he caused the inventory of radio equipment supplied by MMT, but in his possession, to be attached. That equipment presently sits unused in Wilkins' place of business (147-148, 161). Also, Wilkins served as the principal complainant in this criminal proceeding brought by the State of Arkansas against Mr. Smith. Thus, through his own efforts, Wilkins has successfully blocked the corporate progress

of RRTCO, a company which, but for Wilkins, remains viable and, indeed, currently has an application for a construction permit pending before the F.C.C. (451, 469-470, 492).

At the criminal trial, petitioner moved the trial court to direct a verdict for petitioner claiming no sale of stock took place within the meaning of the Arkansas Securities Act and that RRTCO was a joint venture between Wilkins and MMT. Petitioner renewed this contention upon appeal. In the notice of appeal filed by Mr. Smith, *pro se*, he stated that

> "the Defendant ... did not make any sale of securities to Michael E. Wilkins, because Michael E. Wilkins, by prearrangement, had entered a joint venture with Memphis Mobile Telephone, Inc. to form and then own Russellville Radio Telephone Company, Inc. with its subsidiary interests in Hot Springs Radio Telephone Company, Inc., Malvern Radio Telephone Company, Inc., Conway Radio Telephone Company, Inc. and Morrilton Radio Telephone Company, Inc., and to this day Michael E. Wilkins maintains his ownership in the aforementioned corporations, with all their work in progress, assets and rights in applications which are pending

> and certificates granted by the Federal Communications Commission and the Arkansas Public Service Commission respectively."

Petitioner's position was argued thoroughly by counsel, James K. Young, Esq. at pages 62-67 of the written brief submitted on petitioner's behalf to the Supreme Court of Arkansas. The following topic heading appears on page 62

> "The Court Erred In Not Directing A Verdict In Favor Of The Defendant In That No Sale Of Stock Took Place Due To A Joint Venture Between Memphis Mobile Telephone and Mike Wilkins."

Under Rule 29.3 of the Arkansas Supreme Court, Mr. Smith's appeal was assigned to the Arkansas Court of Appeals. In its opinion, attached hereto as Appendix A, the Arkansas Court of Appeals rejected petitioner's position.

Under the circumstances of this case, Rule 29 of the Rules of the Supreme Court of Arkansas allowed no further appeal or review, whether by right or by certiorari, of the decision of the Arkansas Court of Appeals. Thus, the opinion of the Arkansas Court of Appeals

is the "final" judgment or decree rendered by the highest court of Arkansas in which a decision could be had as provided in 28 U.S.C. §1257. Petitioner, acting *pro se*, misinterpreted Rule 29 and sought leave to file a Petition for Review with the Supreme Court of Arkansas. In an order made December 3, 1979, the Supreme Court denied without comment petitioner's request for permission to file a petition for review.

REASONS FOR GRANTING THE WRIT

In construing Section 1 of the Arkansas Securities Act, Ark. Stat. Ann. Sec. 67-1235 (Repl. 1966), the Arkansas Court of Appeals set forth five crucial elements to be used in determining whether a sale of stock has taken place within the meaning of the Act. Those elements are:

(1) the investment of money or money's worth;
(2) investment in a venture;
(3) the expectation of some benefit to the investor as a result of the investment;
(4) contribution towards the risk capital of the venture; and

(5) the absence of direct control over the investment or policy decisions concerning the venture.

After setting forth these five crucial elements in its opinion, however, the Arkansas Court of Appeals made no effort to apply the same to the facts of record. Had the court made such an effort, it would have been clear to the court, as it is clear to petitioner, that there is no evidence of record to support a finding that Michael Wilkins lacked direct control over the investment or policy decisions concerning RRTCO. Rather, the evidence is overwhelmingly to the contrary. Wilkins owns half of the stock of RRTCO, serves as Vice President of the company, has actively participated in the daily operations and management of the company, has actively participated in the preparation and filing of complaints and applications with the F.C.C., has travelled to Washington, D. C., and New York City on company business, filed the company Articles of Incorporation, undertook or assisted in the incorporation, management

and affairs of at least five corporations affiliated with RRTCO, conducted mail surveys and enlisted local support for RRTCO's goals, provided company office space, received and stored equipment, etc. The evidence strikingly demonstrates Wilkins' active participation in the affairs of RRTCO.

In view of the above, the issue here is similar to that confronted by the Court in *Thompson v. Louisville*, 362 U.S. 199, 4 L Ed 2d 654, 80 S Ct 624 (1960). The ultimate question presented is whether the charges against petitioner are so totally lacking in evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Also, *Johnson v. Florida*, 391 U.S. 596, 20 L Ed 2d 838, 88 S Ct 1713 (1968); *Garner v. Louisiana*, 368 U.S. 157, 7 L Ed 2d 207, 82 S Ct 248 (1961); and *Harris v. United States*, 404 U.S. 1232, 1233, 30 L Ed 2d 25, 92 S Ct 10 (1971) (Douglas, J., in chambers). As this Court held in *Vachon v. New Hampshire*, 414 U.S. 478, 38 L Ed 2d 666, 94 S Ct 664 (1974):

> "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged ... violate(s) due process."

Here, there is no relevant evidence that Wilkins lacked direct control over the investment or policy decisions of RRTCO, a crucial and key element of the State's case.

The petitioner's conviction is shockingly wrong and presents a substantial question of due process. The error below is so serious that it affects the very integrity and reputation of a public proceeding. It may thus be characterized as "plain" or "obvious" error. *United States v. Atkinson*, 297 U.S. 157, 160, 80 L Ed 555, 557, 56 S Ct 391 (1936); *Silber v. United States*, 370 U.S. 717, 8 L Ed 2d 798, 82 S Ct 1287 (1962); and *United Brotherhood v. United States*, 330 U.S. 395, 412, 90 L Ed 973, 67 S Ct 775 (1947). Even though the error below is so egregious that it rises to the level of "plain error" and may be considered under Rule 40 (d) (2) of this Court *sua sponte*, the position taken by petitioner today is similar to

that submitted below to the Arkansas courts. There, as here, petitioner argued that no stock transaction took place as contemplated by Section 1 of the Arkansas Securities Act since Wilkins was in control of and directly participated in a joint venture with MMT.

Petitioner's conviction is not only shockingly offensive as a matter of law, it is offensive as a matter of common sense. The requirement imposed by the Arkansas Court of Appeals upon the State to show a "lack of direct control" over the venture is grounded in common sense. When a man places his own money into his own corporation, he should not be heard to complain when the corporation's lack of success is directly attributable to his own malfeasance and his own peripatetic behavior. It is Wilkins' opposition to the goals of his own corporation which has led to delay in RRTCO's ultimate success. Certainly, no third party should be convicted in any court of law in these United States because Mr. Wilkins chooses to behave like a dog chasing his own tail.

CONCLUSION

For these reasons, a writ of certiorari should issue to the judgment and opinion of the Arkansas Court of Appeals.

Respectfully submitted

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January 3, 1980

APPENDIX A

ARKANSAS COURT OF APPEALS

No. CACR 79-23

C. CARLTON SMITH, JR. ... APPELLANT

v.

STATE OF ARKANSAS ..... APPELLEE

Opinion Delivered September 5, 1979

AN APPEAL FROM THE POPE COUNTY CIRCUIT COURT

Honorable John Lineberger, Judge on Exchange

AFFIRMED.

JAMES H. PILKINTON, Judge

Appellant C. Carlton Smith, Jr. was convicted of violating the Arkansas Securities Act, Ark. Stat. Ann. Sec. 67-1235 (Repl. 1966) and was fined $5,000. He has appealed and the case was assigned to the Arkansas Court of Appeals under Rule 29.3 of the Arkansas Supreme Court.

The conviction arose from an alleged offer and sale of stock by appellant to Michael Wilkins of Russellville, Arkansas. It was charged that Smith wilfully employed a device, scheme or artifice to defraud by making untrue statements and failing to

reveal material facts.

Mike Wilkins was in the radio repair business and first met C. Carlton Smith in early May, 1976, when Smith entered Wilkins' place of business in Russellville. Smith said he represented Memphis Mobile Telephone Company, Inc., and was investigating the feasibility of establishing a common carrier radio system in Russellville. He asked Wilkins if he would be interested in servicing the equipment as some local person was needed for that purpose. Smith also said he was looking for a local investor. Wilkins expressed interest, and when Smith came back to see Wilkins a few days later he had Articles of Incorporation with him for a new Arkansas corporation called Russellville Radio Telephone Company. Smith had drawn the incorporation papers without help of an attorney, and had previously filed the document with the Secretary of State on May 5, 1976. He asked Wilkins to file these papers with the local county clerk.

Smith strongly denied at the trial that he made any of the alleged untrue statements or failed to reveal any of the

alleged material facts. However the jury verdict on the disputed evidence settled that phase of the case. The sufficiency of the evidence to support that feature of the case is not questioned on appeal. It is undisputed that Smith also prepared a Memorandum of Understanding for Wilkins to sign dated May 9, 1976, and that this document was executed in Russellville. Wilkins gave Smith a total of $5,000 in three separate checks at different times. It is also undisputed that Smith caused 500 shares of Russellville Radio Telephone Company stock to be issued to Wilkins, and that Wilkins lost his money.

I.

Appellant first argues the trial court erred in not directing a verdict for defendant claiming no sale of stock took place within the meaning of the Arkansas Securities Act. Appellant says the transaction was a joint venture between Memphis Mobile Telephone Company and Wilkins. We find no merit in this contention. A promoter cannot avoid the requirements of the Securities Act by simply labeling or calling his enterprise

a joint venture when in fact such transaction was something different. As stated by the Arkansas Supreme Court in Schultz v. Rector Morris, Inc., 261 Ark. 769, 552 S.W. 2d 4 (1977):

> This court recognizes that regardless of labels, the Arkansas Security Act was designed to protect both investors in common stock and those persons who in substance are investors in the disguised business venture of another.

The obvious purpose of all securities acts is to protect the general public. The U. S. Supreme Court said that the Securities Act of 1933 was designed to protect investors by promoting full disclosure of information throught necessary to informed investment decisions. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 73 S. Ct. 981, 97 L. Ed 1494 (1953). That is also true of the Federal Uniform Securities Act after which the Arkansas statute is modeled.

As stated by Professor Long in "An Attempt to Return Investment Contracts to the Mainstream of Regulations", 24 Okla. L. Rev. 135 (May 1971), there are five

significant common characteristics of traditional securities. These common factors can be used to establish a uniform test for the identification of all securities, whether of a specific type or of a general nature, intended to be covered by the act in question, unless a specific contrary definition is contained therein. These elements are: (1) the investment of money or money's worth; (2) investment in a venture; (3) the expectation of some benefit to the investor as a result of the investment; (4) contribution towards the risk capital of the venture; and (5) the absence of direct control over the investment or policy decisions concerning the venture. Professor Long summarized by stating that a security is an investment of money or money's worth in the risk capital of a venture with the expectation of benefit to the investor where the investor has no direct control over the investment or policy decisions of the venture. There is no indication in the record before us that the Memorandum of Understanding drafted by appellant in this case, or the stock subsequently issued to Wilkins possesses any special attributes

which require them to be treated differently from other forms of securities. This transaction was clearly within the meaning of the Arkansas Securities Act. To hold otherwise would set up a barrier to proper regulation under the act.

II.

Appellant argues as his second point that assuming a "sale" did take place within the meaning of the act, the Circuit Court of Pope County, Arkansas, was without jurisdiction. The evidence shows four separate transactions between defendant C. Carlton Smith and Michael Wilkins: (1) the execution of the Memorandum of Understanding in Russellville on May 9, 1976; (2) the first payment of $345 by Wilkins to Smith at Russellville on May 10; (3) the payment of $800 on June 7 by check drawn by Wilkins on a bank in Pope County; and (4) the $3,855 check to Smith drawn by Wilkins on a bank in Pope County, dated June 10, together with a receipt by Wilkins of Stock Certificate No. 2 issued by Russellville Radio Telephone Company, an Arkansas corporation, for 500 shares. Any one of these transactions would support the jury's verdict. State v. Swain, 31 P. 2d 745 (Ore. 1934). Green v. Weiss,

Boison, Cannon, Inc., 479 F. 2d 462 (7th Cir. 1973). To construe the language of the statute otherwise would permit an issuer or dealer to solicit sales at will in Arkansas without complying with our statute so long as an act entirely within his control, such as placing the proceeds in a bank account or issuing stock certificates, was performed at or from another state. To employ the meaning of the word "sale" ascribed to it by the appellant would convert our state into a safe retreat where unscrupulous dealers in securities could ply their vocation provided they did not make actual delivery of stock in this state. State v. Swain, supra. We find no merit in the second point urged by appellant. See also Ark. Stat. Ann. Sec. 67-1260(c) (Repl. 1966); Shappley v. State, 520 S.W. 2d 766 (Tex. Crim. App. 1974).

III.

Appellant next claims the trial court erred in allowing testimony covering prior dealings involving stock transactions defendant had with other individuals. In admitting testimony of

this kind, the court has two criteria as a guide. The previous conduct must not be too remote from the offense charged and it must be similar in nature to the offense charged. When such evidence is admitted it must be accompanied by a limiting instruction which the court in this case gave. Appellant does not question the instruction given and does not raise the question of the similarity of acts, but does claim that the other similar acts were too remote. He contends that in Carter v. United States, 549 F. 2d 77 (1977) the court held the only evidence of other crimes permissible under Rule 404(b) is where they are in immediate context or res gestae of the offense on trial. While the court in Carter did recognize the res gestae rule, it did so by expanding Rule 404, not limiting it. See 41 ALR Fed. 515. The case of Cary v. State, 259 Ark. 510, 534 S.W. 2d 230 (1976) made it clear the matter of remoteness is addressed to the sound judicial discretion of a trial judge, which will be interfered with by a reviewing court only when it is clear the questioned evidence has no connection with the case.

Caton v. State, 252 Ark. 420, 379 S.W. 2d 537 (1972). The court in People v. Dunn, 40 Cal. App. 2d 6, 104 P. 2d 119 cert. den. 311 U.S. 701, 85 L. Ed. 454, 61 S. Ct. 139 (1940), found that five years between acts was not too remote.

Evidence of similar offenses has been admitted in violations of state security laws in other jurisdictions for the purpose of showing a common scheme or plan. People v. Dutton, 197 P. 2d 937 (1940).

We hold the evidence of other prior similar transactions involving the offer and sale of securities by appellant was properly admitted to show habit and practice of Smith and Memphis Mobile Telephone, operated by Smith, in the normal course of business. Tolbert v. State, 244 Ark. 1067, 428 S.W. 2d 264 (1968); Wilson v. State, 183 Ark. 119, 41 S.W. 2d 764 (1931); and McGhee v. State, 214 Ark. 221, 215 S.W. 2d 135 (1948). It was also properly admitted to show a common scheme, plan and course of dealing by appellant. Kerby v. State, 233 Ark. 8, 342 S.W. 2d 412 (1961).

IV.

Appellant claims that the trial court erred, in light of defense counsel's continuing objection, in allowing the prosecuting attorney to attack the character of Carlton Smith. We need not reach this issue as it was not raised at the trial level, and the judge had no opportunity to consider the matter. Points raised for the first time on appeal will not be considered. Hillard v. State, 259 Ark. 81, 531 S.W. 2d 463 (1976); and Ford v. State, 253 Ark. 5, 484 S.W. 2d 90 (1972)

V.

It is also claimed that the court erred in not granting a mistrial on the basis of a reference made by Michael Wilkins to a prior arrest of defendant Smith in Mississippi. The witness Wilkins was explaining why he was upset and, in answering a question about that fact, made what appellant admits in his brief was an off-the-cuff reference to an arrest of Smith as having occurred on a Mississippi warrant at the apartment in Russellville which was also being used by Smith as a temporary office for Russellville

Radio Telephone Company.

Declaring a mistrial is an extreme remedy granted only when the error is so prejudicial that justice cannot be served by a continuation of the trial. Motion for a mistrial should not be granted when any possible prejudice can be removed by an admonition to the jury. Limber v. State, 264 Ark. 479, 572 S.W. 2d 402 (1978); Gammel & Spears v. State, 259 Ark. 96, 531 S.W. 2d 474 (1976). After overruling defendant's motion for a mistrial, the court admonished the jury:

> BY THE COURT: I will instruct the jury to disregard the testimony, with respect to any other arrest anywhere else. Can all of you assure me, ladies and gentlemen, that you will disregard that testimony? Let me see by a showing of hands. Let the record reflect that the jury unanimously indicated that they will disregard that testimony.

We cannot see, under the circumstances, that appellant was prejudiced by this reference, but if there was any prejudice, it was removed by the admonition

of the court. Johnson v. State, 254 Ark. 293 S.W. 2d 115 (1973).

VI.

Appellant finally argues that the court erred in failing to advise the jury it must find that defendant wilfully employed a device to defraud. This case was carefully tried by the court below and no objection was made to any of the instructions given at the conclusion of the evidence. However, the jury after some deliberations returned and asked the court:

> MR. JONES (Foreman): If we have evidence to prove that one or more of these things were done by the defendant, is that sufficient to convict the defendant or can we decide that one or more of these items is not relevant to the law?
> BY THE COURT: No Sir. If you found that one or more of those items were actually committed by the defendant, beyond a reasonable doubt, then it is your duty to convict. On the other hand, if you should find that he is guilty

> of none of those items on there, then it is your duty to acquit him.
> BY MR. YOUNG: May I make an objection to that?
> BY THE COURT: Yes, sir.
> MR. YOUNG: We object to that statement. We feel like they have to find that one of those items resulted in fraud.

It is evident that reference was being made by the jury and court to the instructions in the case. The court then offered to re-read the entire instructions to the jury, but the foreman said this was not necessary as they had all the written instructions before them in the jury room.

We are at a disadvantage in giving consideration to this point. The Information is not abstracted and we have examined the record and do not find it included. We must assume that the Information was properly drawn and followed the language in Section 1 of the act. The wording of the instructions given so indicates. The trial court had previously instructed the jury that an act is done "wilfully" if it is done knowingly and deliberately with bad purpose.

Section 1 of the act has three subparts. We must also assume that the subparts, including subpart (2) relating to the making of a material misstatement or omitting to state a material fact, were connected in the Information. Appellant cites no authority in support of his point VI so we need not consider it on appeal. Dixon v. State, 260 Ark. 857, 545 S.W. 2d 606, 609, (1977).

Finding no error, the judgment is affirmed.